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JUL 11 1990

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CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

In Re:

MARK N. SMITH, - - - - -Petitioner,

ROOSEVELT COUNTY, MONTANA and
SHERIFF JOHN Q. GRAINGER, - Respondents.

ON APPEAL FROM OPINION OF THE SUPREME
COURT OF THE STATE OF MONTANA AFFIRMING
THE JUDGMENT OF THE DISTRICT COURT OF THE
FIFTEENTH JUDICIAL DISTRICT, ROOSEVELT
COUNTY, MONTANA.

PETITION FOR WRIT OF CERTIORARI

By:

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner, a tenured deputy sheriff, had a protected property interest in his employment and was denied due process of law under Amendment 14, Section 1 of the U.S. Constitution and Article II, Section 17 of the Constitution of the State of Montana, when the District Court denied his motion in limine and when Petitioner was required to defend against a cause of termination which was not specifically set forth as the cause for his termination in the notice of termination.

LIST OF PARTIES

Rule 14.1.(b) of the Supreme Court of the United States requires that the names of all parties to the proceedings be listed unless their names appear in the caption. The parties are as listed in the caption; Mark N. Smith, Roosevelt County, Montana, and Sheriff John Q. Grainger. Mark N. Smith would be the Petitioner and Sheriff John Q. Grainger would be the Respondent.

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FIFTEENTH JUDICIAL DISTRICT, ROOSEVELT
COUNTY, MONTANA.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a
Writ of Certiorari issue to review the
opinion of the Supreme Court of the State

of Montana affirming the Judgment of the District Court of the Fifteenth Judicial District Court, Roosevelt County in that Petitioner was denied due process of law when his motion in limine was denied and he was required to defend against matters which were not given as the cause for his termination as a tenured deputy sheriff.

OPINIONS BELOW

1. The Opinion of the Supreme Court of Montana affirming the judgment of the District Court of the Fifteenth Judicial District, Roosevelt County is reported at __MT__, __P.2d__, 47 St.Rep.506, (March 8, 1990), reprinted (App.1, pp.1a-28a).

2. The Order Denying Petition for Rehearing is not reported, but is contained in (App.3, pp.89a-90a).

STATEMENT OF JURISDICTION

The Opinion of the Supreme Court of Montana affirming the judgment of the District Court was decided March 8, 1990. A timely Petition for Rehearing was denied by Order of the Supreme Court on April 17, 1990. The Petition for Certiorari was filed within 90 days of the Order Denying the Petition for Rehearing.

This Court's jurisdiction is invoked by Petitioner pursuant to 28 U.S.C. Section 1257.

STATUTES AND RULES INVOLVED

Amendment 14, Section 1 of the U.S. Constitution (App.5,pp.95a-96a).

Article II, Section 17, the Constitution of the State of Montana (App.6,pp.96a).

Section 7-32-2107, MCA (App.7,pp.96a-97a).

Section 7-32-2108, MCA (App.8,pp.98a).

Section 7-32-2109, MCA (App.9,pp.98a-99a).

Section 7-32-2110, MCA (App.10,pp.99a).

STATEMENT OF THE CASE

On July 19, 1988, Respondent Grainger terminated Petitioner Smith's employment as a Roosevelt County Deputy for an alleged violation of the Roosevelt County Sheriff's Department Policies And Procedures, Chapter 7, Section 7, Subsection 8, Criminal Conduct and Section 45-5-204, M.C.A., Mistreating Prisoners (See Appendix Pages A-2 & 3). On July 6, 1988, Petitioner was alleged to have mistreated a prisoner, Julian Deserly, who was in his custody at the Roosevelt County Jail in Wolf Point, Montana. On August 17, 1988, Petitioner filed a Complaint and Demand For Jury

Trial requesting reinstatement of his employment (See Appendix Pages A-4, 5, 6, 7 and 8).

On September 12, 1988, Respondents filed a Motion to Dismiss, Affidavit in Support of Motion to Dismiss and Motion to Impose Sanctions Pursuant to Rule 11. On or about September 15, 1988, Petitioner was notified by the Federal Bureau of Investigation that the incident had been referred to their office for investigation and possible prosecution by the U.S. District Attorney's Office. On September 19, 1988, Petitioner filed a brief and two (2) affidavits in opposition to Respondents' Motion to Impose Sanctions Pursuant to Rule 11 and took no further action pending the investigation and prosecution.

On or about November 2, 1988, an

Indictment was filed against Petitioner in U.S. District Court in Great Falls, Montana charging him with mistreating Julian Deserly. The charge set forth in the Indictment was a violation of 18 U.S.C. Sections 1152 and 13 and Section 45-5-204(a), M.C.A.

In January of 1989, a trial was held in which evidence was presented that Respondent had withheld information of the first investigation from subsequent investigators, a video had been erased, booking room photographs disappeared, and Julian Deserly admitted he had only scuffled with Petitioner. On January 19, 1989, the jury found Petitioner not guilty.

On January 31, 1989, Petitioner filed a Brief in Opposition of Motion to Dismiss, Motion in Limine and Brief in

Support of Motion in Limine. On February 6, 1989, Petitioner filed a Motion for Summary Judgment Pursuant to Rule 56, M.R.Civ.P. brief and an affidavit in support of the motion. On February 16, 1989, Respondent filed a response thereto.

At a hearing February 21, 1989, the District Court denied the parties motions and set the Section 7-32-2109, M.C.A. hearing for jury trial March 28, 1989 at 9:00 a.m.

A hearing was held on March 28, 1989. The jury reached a verdict that based on Section 7-32-2107, M.C.A., Respondent was justified in terminating Petitioner. The District Court ordered judgment be entered accordingly. Petitioner appealed the District Court judgment.

The Supreme Court of Montana entered its opinion affirming the judgment of the District Court.

REASONS FOR GRANTING THIS WRIT
OF CERTIORARI

This writ should be granted for the following reasons:

ARGUMENT I

Petitioner, a tenured deputy sheriff, had a protected property interest in his employment and was denied due process of law when the District Court denied his motion in limine to exclude evidence and forbid mention of irrelevant, immaterial and prejudicial matters in the notice of termination and thereby compelled him to defend against the same.

The principles involved in this case have local and national significance. In Montana, Petitioner, a tenured deputy sheriff, has a protected property interest in his employment.

This Court has consistently recognized and protected an employee's property interest in his continued employment where it arises from state statutes. This Court has said:

In order to invoke the procedural safeguards of the Due Process Clause, a plaintiff must show "the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents of State Colleges vs. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972).

This Court has also established guidelines for determining where a protected property interest exists. This Court has said:

A protected property interest in continued employment exists only if the employee has a "legitimate claim

of entitlement" to continued employment. Roth, 408 U.S. at 577, 92 S.Ct. at 2709.

This Court has also recognized how a property interest is created. This Court has said:

Property interests are not created by the Constitution, but arise from independent sources such as state statutes, local ordinances, established rules, or mutually explicit understandings. Perry, 408 U.S. at 601-02 & n.7, 92 S.Ct. at 2699-2700 & n.7. See also Bishop v. Wood, 426 U.S. 341, 344 & n.6, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976).

In Montana, Sections 7-32-2107, 2108, 2109, and 2110, M.C.A. establish procedural due process for the termination of tenured deputy sheriffs. Section 7-32-2107, M.C.A. guarantees a deputy sheriff's continued employment until relieved in the manner provided and

only for one or more specific causes contained therein (App.7,pp.97a-98a). Section 7-32-2108, M.C.A. requires the sheriff to serve upon a deputy a statement in writing, subscribed and sworn to by the sheriff, setting forth the cause or causes for the discharge. (App.8,pp.98a). Section 7-32-2109, M.C.A. entitles the deputy sheriff to a hearing "on the charges resulting in the deputy's termination of employment or discharge" before the district court, with or without a jury, if an application is made within 30 days from the date of the termination (App.9,pp.98a-99a). Section 7-32-2110, M.C.A. requires reinstatement of the deputy if he prevails at the hearing provided for in Section 7-32-2109 (App.10,pp.99a).

This Court has said:

If a plaintiff can prove he has a

property interest in his employment, a state cannot deprive him of that interest without due process. See Roth, 408 U.S. at 576-77, 92 S.Ct. at 2708-09.

Based on the above, under Montana law Petitioner has a property interest in his continued employment. Petitioner was deprived of that property interest without due process of law where his notice of termination gave the specific cause for his termination as an alleged felony committed on July 6, 1988 of which he was acquitted and he was required to defend against other matters contained therein (App.4,pp.90a-95a).

At the hearing March 28, 1989, Respondent was allowed to give testimony regarding matters set forth in his notice of termination which were not the specific cause for Petitioner's

termination. Petitioner has consistently and unsuccessfully argued he was denied due process of law.

Although Petitioner filed a Motion in Limine which would have afforded him due process of law, the motion was denied and Respondent was permitted to testify that all of the matters in his letter amounted to gross inefficiency. (App.11,pp.127a-130a). The notice of termination does not contain the term gross inefficiency, and Respondent has admitted the same (App.2,pp.34a-36a).

In conclusion, the Court should have granted Petitioner's Motion in Limine and issued an order excluding evidence and forbidding mention of the particular facts set forth in Respondent's letter of July 19, 1988 which were not the cause or causes for Petitioner's termination. The

granting of the Motion in Limine would have afforded Petitioner procedural due process under the state statutes and protected his property interest in continued employment as a tenured deputy sheriff.

ARGUMENT II

Petitioner, a tenured deputy sheriff, was denied due process of law by being required to defend against a cause of termination which was not specifically set forth as the cause of his termination in the notice of termination.

Section 7-32-2108, M.C.A. requires a deputy sheriff receive a statement in writing setting forth the cause or causes for his discharge or termination. Respondent's notice of termination set forth matters which were previously dealt with and determined moot issues. (App. 4, pp. 92a-93a). Regardless, Respondent was allowed to testify that his theory

for termination of Petitioner was the letter listed several incidents of prisoner abuse and other matters which constituted gross inefficiency. (App.11,pp.127a-128a).

In the July 19, 1988 notice of termination (App.4,pp.90a-95a), Petitioner was given notice pursuant to Section 7-32-2108, M.C.A. (App.8,pp.98a) that he was being discharged because of the July 6, 1988 Julian Deserly incident. The other matters raised in Respondent's letter compelled Petitioner to defend against the same as well as diverted the jury's attention from the issue of whether Petitioner was properly terminated for the alleged felony prisoner abuse or entitled to reinstatement as a tenured deputy.

Petitioner has consistently

maintained that under Section 7-32-2109, MCA, (App.9,pp.98a-99a) he was entitled to a hearing on the charge resulting in his termination. The cause given in the notice of termination was the July 6, 1988 Julian Deserly incident (App.4,pp.90-95).

In Petitioner's brief to the Supreme Court of Montana he presented the issue of whether he was denied due process of law and equal protection under the law by being required to defend against several accusations of mistreatment of prisoners, gross inefficiency and sleeping on duty when they were not given as the cause or causes of termination in his July 19, 1988 notice of termination required by Section 7-32-2108, MCA (App.8,pp.98a). The Montana Supreme Court's opinion completely ignored the above issue

(App.1,pp.1a-28a).

In ' Petitioner's Petition for Rehearing, it was pointed out to the Montana Supreme Court that its opinion had overlooked certain material facts and failed to address Petitioner's issue (App.2,pp.30a-88a). The Supreme Court again ignored the above and denied Petitioner's Petition for Rehearing on April 17, 1990 (App.3,pp.89a-90a).

The Montana Supreme Court has consistently protected a teacher's property interest in his continued employment created by state statute. The particular cases in which such protection was afforded teachers were set forth in Petitioner's Petition for Rehearing (App.2,pp.29a-89a).

CONCLUSION

We respectfully submit that this

Petition for Certiorari should be granted for the reasons set forth in the arguments above.

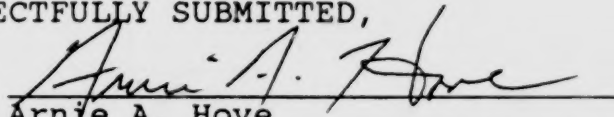
We believe there is a need under the present state of Montana law to establish that tenured deputy sheriffs have a protected property interest in their continued employment which arises from Montana statutes. We further believe there is a need for this Court to mandate that the procedural safeguards in the Montana statutes be followed.

Under the facts and laws of this case, Petitioner is entitled to the procedural safeguards set forth in the state statutes. It is hoped that this Court would recognize the Petitioner's protected property interest in his continued employment and require the procedural safeguards set forth in state

statutes be followed in cases involving
tenured 'deputy sheriffs in Montana.

It is respectfully requested that
this Petition for Certiorari be granted.

RESPECTFULLY SUBMITTED,

A handwritten signature in dark ink, appearing to read "Arnie A. Hove", is written over a horizontal line.

Arnie A. Hove

P.O. Box 184

Circle, MT 59215

Attorney for Petitioner

1a

APPENDIX 1

No. 89-258

IN THE SUPREME COURT OF THE

STATE OF MONTANA

1990

MARK N. SMITH,

Plaintiff and Appellant,

-vs-

ROOSEVELT COUNTY, MONTANA, and
SHERIFF JOHN Q. GRAINGER,

Defendants and Respondents.

APPEAL FROM: District Court of the
Fifteenth Judicial District, In and for
the County of Roosevelt, The Honorable M.
James Sorte, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Arnie A. Hove, Circle, Montana

For Respondent:

Ralph J. Patch, Roosevelt
County Attorney, Wolf Point, Montana

Submitted on Briefs: Oct. 13, 1989
Decided: March 8, 1990
Filed: /s/ ED SMITH

Justice William E. Hunt, Sr., delivered the Opinion of the Court.

Mark N. Smith, plaintiff and appellant, brought this action against Roosevelt County and Sheriff John Q. Grainger, defendants and respondents, alleging that he was unjustifiably terminated from his position as deputy sheriff with the Roosevelt County Sheriff's Department. Following a trial held in the Fifteenth Judicial District Court, Roosevelt County, a jury returned a verdict in favor of defendants. Smith appeals. We affirm.

The following issues are raised on appeal:

1. Whether the District Court erred in denying Smith's motion for summary judgment.

2. Whether Smith was denied a fair trial when the District Court denied his motion in limine and permitted testimony of other wrongdoing that were not the specific reason for his termination.

3. Whether substantial credible evidence supported the jury's finding that Sheriff Grainger justifiably terminated Smith.

4. Whether the District Court erred in refusing to allow opinion testimony on the legal definition of gross inefficiency.

5. Whether the District Court erred in allowing an investigative report to be submitted to the jury.

6. Whether the District Court

erred in instructing the jury on the definitions of assault, battery and mistreatment of prisoners.

7. Whether the District Court erred in instructing the jury in accordance with Rule 404(b), M.R.Evid.

Roosevelt County Sheriff Dean Mahlum hired Mark N. Smith as a deputy sheriff on October 1, 1985. In November, 1986, John Q. Grainger was elected to replace Mahlum and assumed his duties as the new sheriff in January, 1987.

On July 6, 1988, a Roosevelt County dispatcher and a detention officer observed Smith throw a young, intoxicated prisoner onto the floor of the booking room of the county jail and proceed to beat the prisoner's head into the floor. Both the dispatcher and the jailer charged that Smith's actions constituted

an excessive use of force. Smith contended that the actions were needed to physically restrain the prisoner.

Following an investigation, Sheriff Grainger discharged from his employment with the department.

The termination letter dated July 19, 1988, read in its entirety as follows:

This letter is to inform you that the review of the charges in the complaint of (Deputy Mark Smith assaulting prisoner Julian Deserly) has been completed and the disposition finding is classified as "Sustained - The allegation was supported by the proper and sufficient evidence."

The following is to inform you that your employment as a Deputy Sheriff is terminated effective on the above

date. The cause for termination is as follows: On the evening of July 6, 1988, at approximately 5:50 p.m., you did assault a prisoner in your care and custody, namely, Julian Deserly, at the Roosevelt County Jail. This assault occurred without provocation of any kind on the part of the prisoner. Statements made by you to Sgt. Brockmeyer were decisive in indicating that you had no control over yourself at the time the assault occurred and that you, for some reason, wanted to hurt the prisoner.

On separate occasions in 1986 there were investigations into the use of excessive force. Both are documented in your personnel file

and on one incident it is documented that you were suspended without pay for a period of ten (10) days. On your transfer to the Wolf Point area statements were made by you something to the effect of, "when I come into a new place I like to create as much hate and discontent as I can." This type of attitude and a pattern of using excessive force cannot be tolerated.

Other problems such as failing to complete reports properly or even at all and the fact that you were sleeping on duty while assigned to guard the Agribition have not even been formally addressed yet, but I believe the matter at hand is the major concern of this Department and the disciplinary action taken

makes these other violations a moot issue at this time.

The incident with prisoner Julian Deserly is in violation of the Roosevelt County Sheriff's Department's Policies and Procedures, Chapter 7, Section 7, Subsection 8, Criminal Conduct which reads as follows:

"Deputies will obey all laws of the United States, Montana State, and local jurisdictions. Violation of any law, an indictment or information filed against a deputy or a conviction will be cause for disciplinary action up to and including termination of employment. Internal discipline will not be dependent on the outcome of

prosecution."

And the specific law that you violated is 45-5-204 Montana Codes Annotated, Mistreating Prisoners which reads as follows:

"45-5-204. Mistreating Prisoners.

(1) A person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, he purposely or knowingly: (a) assaults or otherwise injures a prisoner, (b) intimidates, threatens, endangers, or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from him or for any other purpose; or (c) violates any civil right of a prisoner. (2) A person convicted of

the offense of mistreating prisoners shall be removed from office or employment and shall be imprisoned in the state prison for a term not to exceed 10 years or be fined an amount not to exceed \$50,000.00 or both."

Because Julian Deserly, the prisoner allegedly assaulted by Smith, was a Native American, the incident was referred to the Federal Bureau of Investigation. In the fall of 1988, an indictment was filed against Smith in Federal District Court, charging him with mistreatment of a prisoner. In January, 1989, a jury found Smith not guilty of the charges.

Prior to the federal indictment, Smith timely filed a petition and demand for jury trial with the Fifteenth

Judicial District Court, Roosevelt
County, pursuant to Section 7-32-3209,
MCA, which provides:

Any deputy sheriff whose employment
is terminated may, within 30 days
from the date of the termination of
his employment, make application to
the district court of the county
wherein the deputy was employed for
a hearing before the court, with or
without jury, on the charges
resulting in the deputy's
termination of employment or
discharge.

Smith sought reinstatement of his
employment with the sheriff's department
pursuant to Section 7-32-2110, MCA, which
provides:

In the event that a deputy prevails

at the hearing provided for in 7-32-2109, he shall be entitled to be reinstated as a deputy sheriff at the same salary he received prior to his discharge or termination of employment and he shall also be entitled to any rights that might have accrued to his benefit prior to his discharge or termination of employment, including that salary which he would have received but for the termination.

Following his acquittal on the criminal charges in federal court, Smith filed a motion for summary judgment in the Roosevelt County District Court. At a hearing held February 21, 1989, the District Court denied Smith's motion for summary judgment and set trial for March 28, 1989. Following a three-day trial,

the jury returned a verdict in favor of defendants, finding that Sheriff Grainger justifiably terminated Smith under Section 7-32-2107, MCA.

I.

Whether the District Court erred in denying Smith's motion for summary judgment?

Summary judgment is proper only if the moving party demonstrates the complete absence of material questions of fact and that he is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. In the present case, Smith, as the moving party, failed to shoulder his burden of proof.

A tenured deputy sheriff may be relieved of his employment only for one or more statutorily enumerated causes. These causes are delineated in pertinent

part in Section 7-32-2107, MCA, as follows:

(1) conviction of a felony subsequent to the commencement of such employment;

. . .

(4) sleeping while on duty;

. . .

(6) gross inefficiency in the performance of official duties.

Smith maintains that the sole cause of his termination was conviction of a felony offense. Therefore, he argues when he was acquitted by a jury on the criminal charges of mistreatment, the reason for his termination was no longer valid. Consequently, he was entitled to summary judgment.

At the root of Smith's argument is a basic misunderstanding of the termination

statute. Smith contends that a deputy sheriff may not be terminated for mistreating a prisoner unless he is convicted of a felony. This simply is not true. A deputy may also be terminated for gross inefficiency in the performance of official duties. A violation of official department policy may constitute gross inefficiency within the meaning of Section 7-32-2107, MCA.

As pointed out in Smith's termination letter, the official policy of the Roosevelt County Sheriff's Department required deputies to obey all laws. A mere violation of the law constituted a violation of department policy, even if the violation did not result in a felony conviction. Therefore, Sheriff Grainger may have justifiably terminated Smith for gross

inefficiency for mistreating a prisoner in his custody, a violation of both state law and department policy.

Numerous questions of fact remained to be resolved by the jury. The jury needed to determine whether a preponderance of the evidence showed that Smith assaulted a prisoner in his care in violation of Section 45-5-204, MCA, mistreatment of prisoners, and whether such a violation of law constituted gross inefficiency. The District Court did not err in leaving these factual determinations to the jury.

II.

Whether Smith was denied a fair trial when the District Court denied his motion in limine and permitted testimony of other wrongdoing that were not the specific cause of his termination.

Prior to trial, Smith made a motion in limine to excise paragraphs in the termination letter that referred to other alleged instances of misconduct, e.g., previous mistreatment of prisoners, failure to complete reports and sleeping while on duty. The District Court denied his motion.

Smith contends that the court's denial of his motion was in error because these alleged wrongdoing were irrelevant and highly prejudicial and should therefore have been kept from the jury. Whether this is so we need not discuss as we note that it was Smith who introduced the letter in its entirety to the jury. Thus, any prejudice that may have been caused by the letter's introduction must be laid at the feet of Smith himself. He cannot now claim that he was denied a

fair trial by the admission of evidence that he himself introduced.

Smith also claims that he was denied a fair trial because the trial court permitted the jury to hear testimony concerning these other instances of misconduct. Once again, we note that this so called highly prejudicial evidence was introduced by Smith in his case in chief. The transcripts demonstrate that Smith repeatedly solicited testimony from witnesses regarding those issues he now claims to be so prejudicial. We will not be misled by Smith's attempt to characterize his unsuccessful trial tactics as errors of the District Court.

III.

Whether substantial credible evidence supported the jury's finding

that Sheriff Grainger justifiably terminated Smith.

In the present case, two eye witnesses testified that, without apparent provocation, Smith grabbed the prisoner, Julian Deserly, by the hair, threw him down and slammed his face into the floor. Smith refuted this testimony, claiming that he was merely following standard procedure for restraining a resisting prisoner.

Even if the proof presented at trial conflicts, as it does in this case, this Court will not reweigh the evidence on appeal. It is uniquely within the province of the jury to determine the weight and credibility to be given each piece of proof. Weinberg v. Farmers State Bank of Worden (1988), 752 P.2d 719, 730, 45 St.Rep. 391, 405.

Viewed in the light most favorable to defendants, the evidence indicated that Smith mistreated Deserly, Therefore, we hold that substantial credible evidence supported the jury's finding that Smith was justifiably terminated from his position.

IV.

Whether the District Court erred in refusing to allow opinion testimony on the legal definition of gross inefficiency.

At trial, Smith attempted to introduce the opinion testimony of former Roosevelt County Sheriff Dean Mahlum and former Undersheriff Robert J. Damm regarding the legal definition of gross inefficiency. The court sustained defendants' objection to this testimony. Smith argues that this was error.

The District Court has broad discretion in determining the admissibility of evidence. We will not overturn its decision to refuse expert testimony absent an abuse of discretion *Massman v. City of Helena* (1989), 773 P.2d 1206, 1210, 46 St.Rep. 764, 768.

Expert testimony in the form of an opinion may be allowed if the specialized knowledge of the expert will assist the trier of fact to understand the evidence or determine a fact in issue. Rule 702, M.R.Evid. Ordinarily, such testimony is allowed if the evidence or fact in issue is beyond the ken of the ordinary juror. Thus, we allow expert evidence regarding scientific or technical matters because such testimony is most generally needed to help jurors understand the evidence and determine the facts of the case.

In the present case, even if we assume that the former sheriff and undersheriff were qualified as experts to give an opinion as to a legal definition, there was no need to allow such expert testimony. At the close of the presentation of evidence, the jurors were instructed on the definition of gross inefficiency. That instruction was not so highly technical as to be beyond the comprehension of the ordinary juror. Because expert opinion testimony was not needed to help the jurors understand the meaning of gross inefficiency, the District Court did not err in refusing such testimony.

V.

Whether the District Court erred in allowing an investigative report to be submitted to the jury.

During his case in chief, Smith encouraged Dennis Brockmeyer, the detective who investigated the assault upon Julian Deserly, to read statements from his interview with Deserly. At that point, defendants asked that the report be marked and given to the jury. Thereupon, the report itself was entered into evidence. Smith objected to the exhibit on the grounds that it would be improper to submit the report to the jury.

As noted previously, the admissibility of evidence lies within the discretion of the trial court. Massman, 773 P.2d at 1210, 46 St.Rep. at 768. The District Court in the present case did not abuse its discretion in allowing the submission of the investigative report to the jury. Smith had already entered the

information into the record when he asked Brockmeyer to read from the report. He can hardly complain that submitting the actual exhibit to the jury substantially prejudiced his position.

VI.

Whether the District Court erred in instructing the jury on the definition of assault, battery and mistreatment of prisoners.

At trial, the District Court instructed the jury as follows:

Instruction No. 8: An assault is any intentional threat of harmful or offensive contact with another by force under circumstances which create a well-founded fear of such contact, coupled with the apparent present ability to carry out the threat. A battery is an intentional contact by one person with

the person.of another which is harmful or offensive.

Instruction No. 9: An arresting officer may use such force as is reasonably necessary to effect a lawful arrest. However, a police officer who uses more force than is reasonably necessary to effect a lawful arrest commits a battery upon the person arrested as to such excessive force.

Instruction No. 10: You are instructed that a person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, he purposely or knowingly assaults or otherwise injures a prisoner.

Smith acknowledges that these instructions are accurate statements of the law but he argues that they should not have been given because they misled

and confused the jury. We do not agree.

Smith was terminated for mistreating a prisoner when he allegedly assaulted Julian Deserly. therefore, the jury had to determine whether a preponderance of the evidence proved that an assault actually occurred. Instruction No. 8 aided the jury in its deliberations by informing it of the definitions of assault and battery. Instruction No. 9 aided the jury by instructing it on the amount of force an officer may use in making an arrest without committing a battery. Instruction No. 10 aided the jury by defining mistreatment, precisely the reason for Smith's termination.

These instructions were not misleading. On the contrary, they were needed to help the jury determine the ultimate fact in issue -- whether Smith

was justifiably fired for mistreating a prisoner in his custody.

VII.

Whether the District Court erred in instructing the jury in accordance with Rule 404(b), M.R.Evid.

During Smith's case in chief as well as after the presentation of evidence, the District Court instructed the jury that evidence of Smith's other wrongdoing was not admitted to prove Smith's character but only to show guilty knowledge of the offense for which Smith was terminated, to show malice, to rebut any claim of accident or mistake, to show motive and to show plan and intent. This instruction was in accordance with Rule 404(b), M.R.Evid. Smith argues that the instruction was confusing and irrelevant and only admissible in criminal cases.

— We need not discuss the merits, if any, of Smith's argument because, in perusing the record, we find a complete absence of any objection to the instruction. By failing to object to the instruction at the District Court level, Smith failed to preserve the issue for appeal. This Court will not review an issue raised for the first time on appeal. Weinberg, 752 P.2d 724, 45 St.Rep. at 396.

Affirmed.

/s/ William E. Hunt

Justice

We Concur:

/s/ J.A. Turnage

Chief Justice

/s/ John C. Sheehy

/s/ John Conway Harrison

/s/ Fred J. Weber

Justices

APPENDIX 2

No. 89-258

IN THE SUPREME COURT OF THE STATE OF
MONTANA

MARK N. SMITH,)
)
Plaintiff/Appellant,)
)
-vs-)
)
ROOSEVELT COUNTY, MONTANA and)
SHERIFF JOHN Q. GRAINGER,)
)
Defendants/Respondents.)

PLAINTIFF/APPELLANT MARK N. SMITH'S
PETITION FOR REHEARING

ATTORNEY FOR PLAINTIFF/APPELLANT:

ARNIE A. HOVE
P. O. Box 184
Circle, Montana 59215

ATTORNEY FOR DEFENDANTS/RESPONDENTS:

RALPH J. PATCH
P. O. Box 1079
Wolf Point, Montana 59201

_____, 1990
 _____, Clerk

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APPELLANT'S PETITION FOR REHEARING

COMES NOW THE Appellant, Mark N. Smith, and petitions this Court for a rehearing in the above-entitled case pursuant to Rule 34 of the Montana Rules of Appellate Civil Procedure.

The specific grounds for this petition are as follows:

The Court's opinion overlooked facts material to the decision i.e., Deputy Smith was not given proper notice under Montana law and Sheriff Grainger admitted the same; failed to address Deputy Smith's decisive Issue No. 3 "Whether plaintiff was denied due process of law and equal protection under the law when he was required to defend against several accusations of mistreatment of prisoners, gross inefficiency and sleeping on duty when they were not given as the cause or causes for termination in defendant's July 19, 1988 notice of termination."; and conflicted with Sections 7-32-2107, 2108, 2109, and 2110, MCA, and controlling decisions protecting teachers' employment under

employment statutes which deny Deputy Smith and tenured deputy sheriffs due process of law and equal protection under the law.

ARGUMENTS IN SUPPORT OF PETITION

FOR REHEARING

The Court's March 8, 1990 opinion affirmed Deputy Smith's termination by Sheriff Grainger and deprives Deputy Smith and tenured deputy sheriffs of a property interest in their employment without due process and equal protection of the law. However, the Court's opinion overlooked certain material facts.

The Court overlooked the material fact that Deputy Smith was not given proper notice of the cause for his termination under Montana law and Sheriff Grainger admitted the same. Before discussing

the significance of the above, Deputy Smith must acknowledge that this Court's opinion correctly recognized certain facts which were not in dispute.

The facts not in dispute are Deputy Smith was a tenured deputy. Deputy Smith was terminated as a result of an incident on July 6, 1988 involving alleged mistreatment of Julian Deserly, a prisoner in his custody. Julian Deserly was a Native American and Deputy Smith was charged with a violation of Section 45-5-204, MCA, mistreatment of prisoners, and tried in federal court. At the trial, Deputy Smith was acquitted of the criminal charge. Following an investigation and prior to the trial, Sheriff Grainger discharged Deputy Smith. The July 19, 1988 letter was the Sheriff's notice of termination to

Appellant as provided for in Section 7-32-2108, MCA.

In addressing the overlooked and most important material fact not in dispute, twice during Sheriff Grainger's testimony he admitted there was nothing in his July 19, 1988 letter to put Deputy Smith on notice he was being terminated for gross inefficiency. The testimony reads as follows:

Q. Now, these three other alleged assaults on prisoners. Was he ever charged with any felony on any of those other assaults?

A. Not to my knowledge, no. The felony, or the criminal aspect, I don't believe so.

Q. Where in your letter did you state that you fired him for gross inefficiency?

A. It is not stated specifically in the letter.

Q. But you've come up with this gross inefficiency since that letter, is that correct?

A. No.

Q. Where is that in the letter?

A. It is not in the letter, specifically.

(T., p.83, 1.15 - p.84, 1.2.)

Q. But it is your duty to notify him of specific causes for his termination, right? Shouldn't it have said then in the letter gross inefficiency?

A. It doesn't say specifically. I agree with you that it should state gross inefficiency, but it doesn't say specific as to

that, but it has to be one of those
-- but it doesn't say gross
inefficiency in there as that
reason.

Q. But that cause is not in
the letter of termination, is it?

A. No. (Emphasis Added).

(T., p.114, 1.4-13.)

The reason this material fact may have been overlooked was that Deputy Smith may have not clearly and concisely set forth his position on its significance and made an analogy to controlling decisions of this Court on the termination of teachers under their employment statutes. In the following, Deputy Smith will set forth his position and make the analogy.

It is Deputy Smith's position that the notice of termination provided by

Sheriff Grainger did not give him proper notice that he was terminated for gross inefficiency. In addition, it is Deputy Smith's position that the resulting hearing in which he was required to defend against gross inefficiency denied him due process of law and equal protection under the law.

In Montana, tenured and nontenure teachers as well as tenured deputy sheriffs have employment statutes establishing proper procedure for the termination of their employment. The teacher statutes establish a teacher's constitutionally protected property interest in his/her employment. This Court has consistently recognized and protected this property interest. This petition will discuss several cases in which this Court recognized and protected

a tenured and nontenure teacher's property interest and apply the reasoning herein.

One case which will be discussed is Board of Trustees vs. Gallup, 171 Mont. 278 (1977). The Gallup opinion was delivered by Chief Justice James T. Harrison and Justices Daly, John C. Harrison, Haswell and L.C. Gulbrandson, District Judge, sitting for Justice Castles concurred. Another case which will be discussed is Lindgren v. Board of Trustees, 171 Mont. 360 (1976). The Lindgren opinion was delivered by Justice Daly and Chief Justice James T. Harrison and Justices Haswell and John C. Harrison, and Jack Green, District Judge, sitting for Justice Castles, concurred. Finally, the more recent case of Bridger vs. Board of Trustees, 209 Mont. 31

(1984) will be discussed. The Bridger opinion was delivered by Justice Morrison and Chief Justice Haswell and Justices Shea, Weber and Sheehy concurred.

In Gallup, the facts parallel those in Deputy Smith's case and were as follows:

In the spring of 1973, the appellant had been employed as a teacher by respondent Board of Trustees, for nine consecutive years. Appellant was offered and he accepted a teaching contract for the 1973-74 school years.

On August 30 and 31, 1973 the school district conducted a pre-school orientation for new and returning teachers. Appellant attended the morning session on August 30, 1973 and both sessions

August 31, 1973. He failed to attend the afternoon session August 30, 1973. On August 31, 1973, appellant was asked to explain his absence the previous day, he responded, and was then suspended. He later received this letter:

"You are hereby notified of your suspension as an employee of School District No. 9, effective August 31, 1973, for failure to attend opening day school exercises on August 30, 1973, in violation of terms of your teaching contract.

"The Board of Trustees will meet at 1:30 P.M. on Tuesday, September 4, 1973, in the school administration building, to consider further action on this matter.

"You are hereby requested to

attend the meeting and state your reasons for not attending opening day activities." (Emphasis Added.)

Appellant attended the meeting and stated he was ill on the afternoon of August 30, 1973. It was discovered the appellant worked elsewhere that particular afternoon. In addition to the absence specified in the letter, the Board also inquired into and considered the absences of appellant throughout the entire nine years of employment. Thereafter, the Board voted to dismiss appellant.

Appellant apealed (sic) to the County Superintendent of Schools, and was reinstated, for the reason that a one-half day of absence was not considered an emergency or sick

leave and did not justify dismissal, but a deduction of pay.

The Board then appealed to the State Superintendent of Public Instruction, whereupon the County Superintendent's decision was affirmed. The State Superintendent found the one-half day absence was de minimis, and the absences prior to appellant's 1973-74 contract could not be considered by the Board, and as such could not be part of the basis for dismissal.

The Board then appealed to the district court. The district court reversed the State Superintendent's decision, concluding that:

(a) The Board was entitled to consider appellant's absences occurring prior to his 1973-74

contract.

(b) When combined with consideration of such absences, the unexcused one-half day absence was legally sufficient to justify dismissal.

(c) The Superintendent of Public Instruction exceeded her authority in making her decision by incorrect application of law as to what the Board could consider in determining action to be taken on the one-half day unexcused absence. Id. at 324-325.

The Court's review of the dismissal of appellant was limited to section 75-6107, R.C.M. 1947 which states:

"The trustees of any district may dismiss a teacher before the expiration of his employment

contract of immorality, unfitness, incompetence, or violation of the adopted policies of such trustees. Any teacher who has been dismissed may in writing within ten (10) days appeal such dismissal to the county superintendent; following such appeal a hearing shall be held within ten (10) days. If the county superintendent, after a hearing, determines that the dismissal by the trustees was made without good cause, he shall order the trustees to reinstate such teacher at his contract amount for the time lost during the pending of the appeal." (Emphasis added.)

At the time of Gallup, Section 75-6107, R.C.M. 1947 contained no clear procedures for protecting a teacher's

employment but this Court was not deterred from recognizing and affording teachers appropriate protection. In addition, the legislature has since recognized and afforded protection in section 75-6107, R.C.M. 1947. The section was recodified to Section 20-4-207, MCA and amended by Sec. 2 C. 56, L. 1985 and Sec. 1, C. 28, L. 1989.

In any event, the Court applied section 75-6107, R.C.M. 1947 and held the conclusions of law of the district court were in error. The judgment was reversed and the action of the State Superintendent of Public Instruction reinstating appellant for the remainder of his 1973-74 teaching contract was affirmed. The portions of the opinion which address the teacher employment statutes and a step by step analogy are

set forth below.

In Gallup, the Court first held:

[1,2] It is apparent that dismissal of a teacher under section 75-6107, R.C.M.1947, must be for one of the four specified causes, which is further qualified by the county superintendent's scope of review to amount to good cause. Although no method of procedure is set forth in the statute for the guidance of the school board, it is a well defined principle, in such circumstances where dismissal must be for good cause and regulated by statute, that one is entitled, in common justice, to an opportunity to meet the charges before being dismissed. [Citations omitted.] Id. at 326-327. In a brief analogy between the

employment statutes, Section 75-6107, R.C.M. 1947 and Section 7-32-2107, MCA both require the dismissal of a teacher and deputy sheriff for specified causes. Section 75-6107, R.C.M. 1947 and Section 7-32-2109, MCA both require a teacher and deputy sheriff be given an opportunity (hearing) to meet the cause or causes for their termination.

In Gallup, the Court next held:

[3] The opportunity to meet the charges before being dismissed under them necessarily includes notice of the charges against him, for without such notice this opportunity would be meaningless. The notice need not meet the formal requirements of a criminal indictment, however it must be sufficiently detailed to inform the

teacher of the charges against him, so he is reasonably able to formulate a defense.

In Deputy Smith's case, he and all tenured deputy sheriffs should be afforded the opportunity to meet the charges before being dismissed which also necessarily includes sufficiently detailed notice of the charges. Because the words gross inefficiency appear nowhere in the July 19, 1988 letter, Deputy Smith was improperly required to meet this cause and could not have been expected to formulate a defense. In addition, with other incidents Sheriff Grainger wrote were not actual causes for termination in the notice which the district court refused to excise when twice presented with a motion in limine, Deputy Smith could not reasonably be

expected to formulate a defense.

In Gallup, this Court went so far as to adopt a doctrine to provide this protection. This doctrine provided protection which Deputy Smith should have been and tenured deputy's are provided under Sections 7-32-2107, 2108, 2109, and 2110. The doctrine adopted in Gallup reads:

[4] For these reason we adopt the doctrine set forth in 68 Am.Jur.2d, Schools, Section 194, which states:

"While school boards are not bound to strict conformity with court rules and practices, they must, nevertheless, observe the elementary and fundamental principles of judicial inquiry. And although a degree of informality may

attend the administrative proceedings, it must appear that the dismissal is based upon evidence supporting the specific charge or charges against the teacher and upon no other evidence.***" (Emphasis added.) Id. at 327.

In applying the above, Deputy Smith's termination should have been based on only evidence supporting the specific charge, the Julian Deserly incident of July 6, 1988, and no other evidence. (Emphasis again added.)

Also, the matter of the motions in limine and the significance of their denial are very important. This Court's opinion did recognize one of Deputy Smith's unsuccessful attempts with a motion in limine to excise paragraphs in the termination letter that referred to

other alleged instances of misconduct, e.g., previous mistreatment of prisoners, failure to complete reports and sleeping while on duty. However, the Court berates Deputy Smith's trial tactics and lays the blame for the letter's introduction at his feet. This is an unfair criticism of Deputy Smith's timely and diligent attempts to have the district court afford him the due process of law and equal protection under the law he and all tenured deputy sheriffs are automatically entitled to by virtue of existing statute.

It should be recognized without having to be said, the July 19, 1988 letter was a relevant, material and essential piece of evidence which had to be presented to the trier of fact. If the irrelevant, immaterial and

prejudicial paragraphs had been excised and which Sheriff Grainger's indicated contained matters which were not causes for Deputy Smith's termination, Deputy Smith would have been afforded due process of law and equal protection under the law by receiving a hearing on the only cause of termination in the notice.

The district court's denial of Deputy Smith's motions in limine placed him, as the plaintiff, in a precarious position of having to examine Sheriff Grainger regarding the July 19, 1988 notice of termination. The only logical way he could proceed with his case in chief was to introduce the notice and attempt to meet the cause of termination set forth therein. The portion of the transcript dealing with the notice's introduction is found in the Transcript

beginning at page 71, line 4.

During Sheriff Grainger's testimony, he testified the July 19, 1988 letter meets the requirements of Montana law as a notice of termination (Tr. p.72, l. 7-21). The notice was subscribed and sworn to and contained a cause of termination, the Julian Deserly incident of July 6, 1988. However, Sheriff Grainger testified contrary to the above. Sheriff Grainger testified:

"That he assaulted a prisoner in his care on July 6th, and that because of past incidents in 1986, that the same type of incident where a prisoner had been assaulted that he was being terminated, and then the other paragraph it talks about those two incidents and the fourth paragraph it talks about other

things that we hadn't addressed yet." (Tr. p72, l. 24 to p. 73, l.6).

Further contradictory testimony of Sheriff Grainger went as follows:

Q. Give me a specific incident that you are going to use as a cause of his termination?

A. But before I took office, there are documented in his personnel file, three separate reports of assault on a prisoner. I was familiar with on specific incident when I came into office and so I reviewed the personnel file and there were several documents in there showing that Mark had used excessive force on prisoners and when this incident specifically came to light, and tried to forget about

the past, but it was there, it was documented, we used those in the termination of his employment.

(Emphasis Added.)

(Tr. p. 76, l. 22 to p. 77, l. 7).

Q. So it is your testimony here today, as having set forth the cause for termination, the assault on Julian Deserly, and having set forth the policy and procedure on criminal conduct, having set forth the statute, 45-5-204, and that is a felony violation, that you terminated him for an assault and you are claiming that that is gross inefficiency?

A. With the other incidents that was taking place, yes.

(Tr. p. 80, l. 13-20.)

In concluding the discussion of the

district court's denial of Deputy Smith's motion in limine and this Court's affirmation of the denial, this is contrary to the holding and reasoning therefor in Gallup and allowed other evidence not supporting the specific charge to go to the jury. The holding, as previously discussed, was a reversal of the district court and reinstatement of the teacher. The reasoning for the above went as follows:

[5] As concluded by the State Superintendent of Public Instruction and the County Superintendent, this certainly was not the case with the Board's dismissal of appellant. The letter of notice sent by the Board most clearly refers to the one-half day unexcused absence as the sole reason for his dismissal,

and informs him to appear and respond to the specific absence. However, when appellant presented himself at the hearing, he was also questioned and investigated as to instances occurring throughout the entire nine years of his employment. Appellant was not given proper notice of these additional charges. Therefore, the Board could not consider them nor make them a basis or a portion of the basis for appellant's dismissal.

In applying the above to the undisputed facts herein, Sheriff Grainger's notice of termination clearly specifies the July 6, 1988 incident involving Julian Deserly as the sole reason for Deputy Smith's termination. When Sheriff Grainger was questioned as

to Deputy Smith's cause for termination, Sheriff Grainger testified to incidents occurring in a prior administration which had been investigated and dismissed or otherwise dealt with. Deputy Smith was not given proper notice of these other charges and Sheriff Grainger's notice stated those matters were moot yet still testified they were used as causes of termination. Furthermore, Deputy Smith was not given written notice of the cause of gross inefficiency since those words were not in the notice and the tenured deputy sheriffs' statutes entitled Deputy Smith to written notice of gross inefficiency before being expected to defend against the same.

The general rule of law Deputy Smith argued in his Reply Brief this Court should follow reads:

The procedure governing the removal of deputy sheriffs from office depend upon whether the deputy sheriff is considered to have a property interest in his position in that jurisdiction; which in turn depends upon whether his employment is terminable at the will of the sheriff. Where a sheriff has absolute control over the selection and retention of his deputy sheriffs, courts have held that deputy sheriffs have no property or liberty interests in their positions for purposes of the Fourteenth Amendment of the Federal Constitution and comparable state statutory and constitutional provisions....

It is not always the case that

a deputy sheriff has no property interest in his employment such that he is not entitled to due process protection; a distinguishing factor is whether the employment of the deputy sheriff is terminable solely at the will of his employer. Thus, in certain cases, a deputy sheriff may be a permanent employee, and therefore may maintain successfully that a procedure used for dismissal was violative of the constitutional right to due process of law, for example, where she was not afforded an opportunity to explain the charges prior to the effective date of the dismissal. 70 Am.Jur.2d Sheriffs, Police and Constables Section 19 (1987).

In applying the above, Deputy Smith

has a property interest in his employment. Procedures for the termination of tenured deputy sheriffs are established and set forth in Sections 7-32-2107, 2108, 2109, and 2110, MCA. These procedures were not followed in Deputy Smith's case. This Court's opinion in effect made Deputy Smith's termination at the will of Sheriff Grainger. This at will termination is reflected by Sheriff Grainger's testimony which reads:

Q. So one cause under the statute, gross inefficiency. Now all of those things that we have discussed here today, testified here today here, what is it that fits into the gross inefficiency statute?

A. Every incident of

excessive force and assaulting prisoners including the Julian Deserly incident is gross inefficiency in performing his duties.

Q. How is that gross inefficiency?

A. If something happens enough times, you finally -- it becomes gross at a certain point and beating prisoners or even mistreating prisoners is not a procedure that law enforcement uses, and therefore if it is not an efficient means to do it, then it is inefficient.

Unless this Court grants a rehearing, all tenured deputy sheriffs' employment will be at the will of their respective sheriffs contrary to statutes,

general rule of law and controlling case law protecting teachers' employment.

Another case in which this Court protected a teacher's employment is Lindgren vs. Board of Trustees, 171 Mont. 360 (1976). In Lindgren, the Court protected a tenured teacher's right to his employment by requiring a legal sufficient notice. The teacher had been convicted for driving under the influence of intoxicating liquor and driving without a valid driver's license. Because of the relevance of Lindgren to Deputy Smith's case much of the opinion is set forth and reads:

[1] Next, we determine whether the basis for dismissal utilized by the Trustees is legally sufficient for dismissal. Under section 75-6107, R.C.M.1947, the dismissal of a

teacher under contract requires a showing of immorality, unfitness, incompetence, or violation of the adopted policies of the Trustees. The initial letter of dismissal failed to substantiate any causal relationship between appellant's violations and his performance of teaching duties. This Court does not find, as a matter of law, that violations for driving under the influence of intoxicating liquor and driving without a valid driver's license are tantamount to "immorality, unfitness, incompetence, or violation of the adopted policies of such trustees." Absent such showing, the discharge of appellant amount to a breach of contract. Hovland vs. School Dist.

No 52, '128 Mont. 507, 278 P.2d 211.

Respondent Trustees contend appellant's dismissal should be upheld based upon the amended and consolidated letter of dismissal which states:

"Since charges were initially brought against Mr. Lindgren, additional information has come to the board. For his reason, amended and consolidated notice for dismissal is given.

"The causes are: 'immorality, unfitness, incompetence, and failure to conform to and enforce the laws ***.' (See sections 75-6107 and 75-6108, Revised Codes of Montana.) These causes grow out of Mr. Lindgren's arrest for DWI and driving without a valid Montana

driver's license on April 14, 1973 and his conviction thereupon on July 16, 1973. In addition, the charges stem from Mr. Lindgren's performance as a teacher in his school, particularly as to his poor relationship with students, his lack of willingness to make adequate plan preparation, his failure to accept responsibility in the school, his lack of interest in the students, his failure to maintain adequate class supervision and discipline, his poor example to students, his failure to convey skills possessed by him to his students as he should, his failure to take proper care of the classroom and the property placed in his charge, and his arrival at school in

a disheveled appearance, smelling of alcoholic beverages."

[2] Respondents argue the clear and unequivocal ratification of the amended and consolidated letter of dismissal is proper. Furthermore, they contend appellant was not prejudiced by the amended notice of dismissal. Respondents cite the holding of the district court as authority for the proposition that "so long as there is notice and opportunity for hearing the Board can amend its charges for dismissal prior to hearing as was done here". We do not agree.

The additional charges alleged in the amended and consolidated letter of dismissal are derived from

information which was available to the trustees at the time of the drafting of the initial letter of dismissal and at the time the Trustees accepted a new contract of employment for the 1973-74 year on April 30, 1973. This Court has already concluded the initial letter of dismissal did not establish legally adequate grounds for dismissal. To recognize the amended letter of dismissal as adequate in law would amount to submitting appellant to the burden of establishing the invalidity of charges propounded for the purpose of remedying legally inadequate charges. The Court concludes appellant incurred substantial legal prejudice when required to

meet these additional charges.

In view of our determination of appellant's first issue, further discussion regarding the sufficiency of the evidence is unnecessary.

The judgment of the district court is reversed and the cause remanded for the determination of emoluments due appellant pursuant to statute and case authority. Id. at 365-367.

In briefly discussing Lindgren, if this Court were to afford Deputy Smith and all other tenured deputy sheriff's the due process of law and equal protection under the law afforded tenured teachers, Deputy Smith would have been required to only defend against the Julian Deserly incident on the basis that it was a felony of which he was not

convicted. In addition, this Court would find substantial legal prejudice because Deputy Smith's motions in limine were denied and he was required to meet additional charges the notice acknowledged as moot issues. Furthermore, Sheriff Grainger's testimony contradicted his notice and established he had used the moot issues as causes for Deputy Smith's termination since they established gross inefficiency.

In another case, Bridger vs. Board of Trustees, 209 Mont. 31 (1984), this Court recognized and extended protection to nontenure teachers under Section 20-4-206(3). The Board of Trustees gave a teacher a timely notice of teacher with the reason it believed it "could find a better teacher." Although the District Court found the statement was in

compliance with Section 20-4-206(3) which requires the trustees of the School District to furnish a written statement "of the reasons for termination of employment" of a tenured teacher. Id. at 32. This Court reversed the judgment of the District Court and held, "The nontenure teacher is entitled to a notice which states what undesirable qualities merit a refusal to enter into a further contract." Id. at 34.

In addressing Deputy Smith's contention this Court's opinion failed to address Appellant's Issue No. 3 in the Brief of Plaintiff/Appellant Mark N. Smith, the issue will be set forth and discussed. The issue reads as follows:

Whether plaintiff was denied due process of law and equal protection under the law by being required to

defend against several accusations of mistreatment of prisoners, gross inefficiency and sleeping on duty when they were not given as the cause or causes for termination in defendant's July 19, 1988 notice of termination required by Section 7-32-2108, M.C.A.

Under the general rule of law set forth in Appellant's Response Brief and again herein, as a tenured deputy sheriff he has a property interest in his employment which is protected by Section 17 of the Montana Constitution and the Fourteenth Amendment of the U.S. Constitution. The protection afforded is, "[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the

equal protection of the laws."

The Montana laws governing the termination of a tenured deputy are Sections 7-32-2107-2110, M.C.A. These sections establish the statutory protection of Deputy Smith's property interest and the statutorily mandated procedure which must be followed to insure him due process of law and equal protection under the law. These sections and a brief discussion of the mandated procedure is set forth below.

Section 7-32-2107, MCA mandates that a deputy sheriff shall continue in service until relieved of his employment for one or more of six (6) specified causes and in the manner provided. This section reads:

Any deputy sheriff now employed or who may hereafter be employed shall

continue in service until relieved of his employment in the manner hereinafter provided and only for one or more of the following specified causes:

(1) conviction of a felony subsequent to the commencement of such employment;

(2) willful disobedience of an order or orders given by the sheriff;

(3) drinking intoxicating liquor while in uniform or while on official duty or being intoxicated in a public place while in uniform or while on official duty;

(4) sleeping while on duty;

(5) incapacity materially affecting ability to perform official duties;

(6) gross inefficiency in the performance of official duties.

The manner provided by statutory mandate, is that Deputy Smith as well as all tenured deputies shall continue in service until relieved of their employment in the manner provided for in Sections 7-32-2108 and 2109, MCA. Section 7-32-2108, MCA, reads:

When a sheriff terminates the employment of a deputy, he shall at the time of termination cause to be served upon said deputy a statement in writing, subscribed and sworn to by the sheriff, setting forth the cause or causes for the discharge or termination of the deputy's employment.

Sheriff Grainger did serve the July 19, 1988 letter upon Deputy Smith. The

letter was a statement in writing which was subscribed and sworn to by the Sheriff setting forth the cause for Deputy Smith's termination. The letter sets forth one and only one cause for Deputy Smith's termination, the July 6, 1988 incident involving Julian Deserly. In addition, the letter's language construes the incident as a violation of the Roosevelt County Sheriff's Department's Policies and Procedures, Chapter 7, Section 7, Subsection 8, Criminal Conduct and Section 45-5-204, MCA. However, the letter does not set forth the cause of gross inefficiency in the performance of official duties.

This Court recognized that Deputy Smith was terminated as a result of the Julian Deserly incident, however, this Court permitted the application of the

Sheriff's policy to determine whether the incident constituted gross inefficiency. Because the letter does not set forth the cause of gross inefficiency in the performance of official duties, under Section 7-32-2109, MCA Deputy Smith should not have been required to defend against gross inefficiency. Section 7-32-2109, MCA reads:

Any deputy sheriff whose employment is terminated may, within 30 days from the date of the termination of his employment, make application to the district court of the county wherein the deputy was employed for a hearing before the court, with or without jury, on the charges resulting in the deputy's termination of employment or discharge.

In this Court's opinion at page 6, is stated:

At the root of Smith's argument is a basic misunderstanding of the termination statute. Smith contends that a deputy sheriff may not be terminated for mistreating a prisoner unless he is convicted of a felony. This simply is not true. A deputy may also be terminated for gross inefficiency in the performance of official duties. A violation of official department policy may constitute gross inefficiency within the meaning of Section 7-32-2107, MCA.

As pointed out in Smith's termination letter, the official policy of the Roosevelt County Sheriff's Department required

deputies to obey all law. A mere violation of the law constituted a violation of department policy, even if the violation did not result in a felony conviction. Therefore, Sheriff Grainger may have justifiably terminated Smith for gross inefficiency for mistreating a prisoner in his custody, a violation of both state law and department policy.

Numerous questions of fact remained to be resolved by the jury. The jury needed to determine whether a preponderance of the evidence showed that Smith assaulted a prisoner in his care in violation of Section 45-5-204, MCA, mistreatment of prisoners, and whether such a violation of law

constituted gross inefficiency. The District Court did not err in leaving these factual determinations to the jury.

In responding to the above, Deputy Smith believes the Court had a misunderstanding of Deputy Smith's position. Deputy Smith understands mistreatment of prisoners or violating official department policy may constitute gross inefficiency within the meaning of Section 7-32-2107, MCA. What Deputy Smith does not understand is why he is made to defend against gross inefficiency when the July 19, 1988 letter does not contain the term gross inefficiency or a specific statement that the July 6, 1988 incident was gross inefficiency. Deputy Smith's position is simply because gross inefficiency was not the specific cause

for termination which the statutes mandate must be set forth in the statement of termination, he should not have been required to defend against the same.

Because Sheriff Grainger did not comply with Sections 7-32-2107 through 7-32-2109, MCA, Deputy Smith was not afforded due process of law and equal protection under the law afforded tenured and nontenure teachers under their employment statutes and by this Court in the controlling cases of Gallup, Lindgren, and Bridger. Therefore, Deputy Smith is entitled to summary judgment and reinstatement with the rights and benefits provided by Section 7-32-2110, MCA. This section reads:

In the event that a deputy prevails at the hearing provided for in 7-32-

2109, he shall be entitled to be reinstated as a deputy sheriff at the same salary he received prior to his discharge or termination of employment and he shall also be entitled to any rights that might have accrued to his benefit prior to his discharge or termination of employment, including that salary which he would have received but for the termination.

Another point which must be made is the Court failed to recognize the significance of Deputy Smith's acquittal of the charge of mistreatment of a prisoner in relationship to Section 7-32-2107(1), MCA which requires conviction of a felony subsequent to the commencement of such employment before termination. All law enforcement officers are subject

to unwarranted accusations of mistreatment of prisoners and etc. which from time to time may require they defend themselves against such a charge. Section 7-32-2107(1), MCA provides statutorily mandated protection by anticipating and precluding a Sheriff's action of terminating a deputy sheriff for any alleged felony prior to a conviction for the same. This Court failed to recognize this protection.

In the instant case the protection afforded by Section 7-32-2107(1) was necessary to preclude such action as Sheriff Grainger's especially where he was aware of Officer Neumiller's investigation of the incident and Julian Deserly's first statement where he admitted his struggle with Deputy Smith, he was not hurt and he did not want to

prosecute. This Court was advised that at the trial in Federal District Court in Great Falls the evidence disclosed Sheriff Grainger had kept information of Julian Deserly's first statement from the second investigating officer and FBI agents; bookkeeping room photographs had disappeared; and the video was partially erased. Finally, Julian Deserly had struggled with several Roosevelt County deputies in the same booking room just after the incident with Deputy Smith and before Smith's trial in Great Falls and that video disappeared.

The above resulted in Deputy Smith's acquittal, and therefore, a proper application of Section 7-32-2107(1) would preclude further proceedings thereon even under a lesser burden of proof (preponderance of the evidence) and/or

termination of employment. There was no excuse for Sheriff Grainger's failure to advise law enforcement officers of the first statement. There was no excuse for the disappearance of the photographs which would have clearly revealed injuries inflicted by Deputy Smith if Smith had "proceeded to beat the prisoner's head into the floor" as this Court's opinion suggest the facts reveal. There was no excuse for the video being partially erased. Therefore, this Court should not join in Sheriff Grainger's termination of a tenured deputy for an alleged felony in which evidence was withheld, destroyed and/or disappeared.

Although this Court found that Roosevelt County Sheriff's Department's Policies and Procedures, Chapter 7,

Section 7, Subsection 8, Criminal Conduct may circumvent the requirement of a conviction, Deputy Smith was still entitled to due process of law and equal protection of the law as provided by Sections 7-32-2107-2110, MCA. Where the notice of termination did not contain the words gross inefficiency and/or expressly indicate violating department policy demonstrated gross inefficiency, Deputy Smith should not have been required to defend against the same.

Because this Court's opinion is in conflict with Sections 7-32-2107, 2108, 2109, and 2110, MCA and controlling cases protecting tenured and nontenure teachers' employment, Deputy Smith and other tenured deputy sheriffs are denied due process of law and equal protection under the law.

CONCLUSION

In conclusion, Mark N. Smith has presented grounds for a rehearing which discuss facts material to the decision and a question decisive of the case previously submitted which were overlooked by this Court. The decision of this Court is in conflict with the employment statutes for tenured deputy sheriffs and fails to recognize and protect their property interest in continued employment. The decision further conflicts with the Court's controlling decisions recognizing and protecting the property interests of tenured and nontenure teachers in Montana. Therefore, this Court's decision denies Mark N. Smith and all tenured deputy sheriffs in Montana due process of law and equal protection under

the law.

Mark N. Smith hereby requests a rehearing with oral argument to correct the inequities resulting to tenured deputy sheriffs as a result of this decision.

RESPECTFULLY SUBMITTED this 19th day of March, 1990.

/s/ Arnie A. Hove

Arnie A. Hove
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

This is to certify that the PETITION FOR REHEARING of PLAINTIFF/APPELLANT MARK N. SMITH was duly served by United States mail, postage prepaid thereon, upon opposing attorney of record, Ralph J. Patch, Roosevelt County Attorney, P.O. Box 1079, Wolf Point, Montana 59201, this _____ day of March, 1990.

/s/ Arnie A. Hove

Arnie A. Hove
Attorney for Plaintiff/Appellant

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF
MONTANA

No. 89-258

MARK N. SMITH,

Plaintiff and Appellant,

v.

ROOSEVELT COUNTY, MONTANA,
and SHERIFF JOHN Q. GRAINGER,

Defendants and Respondents

)
)
)
)
) ORDER
)
)
)
)
)

The petition for rehearing is
denied.

DATED this 17th day of April, 1990.

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ John C. Sheehy

90a

/s/ William E. Hunt, Sr.

/s/ Fred J. Weber
Justices

APPENDIX 4

COUNTY OF ROOSEVELT

Office of

JOHN Q. GRAINGER

Sheriff

Box 280

Wolf Point, Montana 59201

TO: MARK SMITH, DEPUTY
FROM: JOHN Q. GRAINGER, SHERIFF
DATE: JULY 19, 1988
RE: TERMINATION

This letter is to inform you that the charges in the complaint of (Deputy Mark Smith assaulting prisoner Julian Deserly) has been completed and the disposition

finding is classified as "Sustained - The allegation was supported by the proper and sufficient evidence."

The following is to inform you that your employment as a Deputy Sheriff is terminated effective on the above date. The cause for termination is as follows: On the evening of July 6, 1988, at approximately 5:50 p.m., you did assault a prisoner in your care and custody, namely, Julian Deserly, at the Roosevelt County Jail. This assault occurred without provocation of any kind on the part of the prisoner. Statements made by you to Sgt. Brockmeyer were decisive in indicating that you had no control over yourself at the time the assault occurred and that you, for some reason, wanted to hurt the prisoner.

On separate occasions in 1986 there were investigations into the use of excessive force. Both are documented in your personnel file and on one incident it is documented that you were suspended without pay for a period of ten (10) days. On your transfer to the Wolf Point area statements were made by you, something to the effect of, "when I come into a new place I like to create as much hate and discontent as I can." This type of attitude and a pattern of using excessive force cannot be tolerated.

Other problems such as failing to complete reports properly or even at all and the fact that you were sleeping on duty while assigned to guard the Agribition have not even been formally

addressed yet, but I believe the matter at hand is the major concern of this Department and the disciplinary action taken makes these other violations a moot issue at this time.

The incident with prisoner Julian Deserly is in violation of the Roosevelt County Sheriff's Department's Policies and Procedures, Chapter 7, Section 7, Subsection 8, Criminal Conduct which reads as follows:

"Deputies will obey all laws of the United States, Montana State, and local jurisdictions. Violation of any law, an indictment or information filed against a deputy or a conviction will be cause for disciplinary action up to and including termination of employment. Internal

discipline will not be dependent on the outcome of prosecution."

And the specific law that you violated is 45-5-204 Montana Codes Annotated, Mistreating Prisoners which reads as follows:

"45-5-204. Mistreating Prisoners.

(1) A person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, he purposely or knowingly: (a) assaults or otherwise injures a prisoner, (b) intimidates, threatened, endanger, or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from him or for any other purpose; or (c) violates any civil right of a prisoner.

(2) A person convicted of the offense of mistreating prisoners shall be removed from office or employment and shall be imprisoned in the state prison for a term not to exceed 10 years or be fined an amount not to exceed \$50,000.00 or both."

/s/John Grainger

JOHN GRAINGER, SHERIFF

Subscribed and sworn to before
me this 19th day of July, 1988.

/s/ Patty K. Helwich

NOTARY PUBLIC

Notary for the State of Montana
Residing at Wolf Point, Montana
My Commission Expires August 1, 1989

APPENDIX 5

AMENDMENT 14, SECTION 1 OF

THE U.S. CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 6

ARTICLE II, Section 17, THE CONSTITUTION OF THE STATE OF MONTANA

No person shall be deprived of life, liberty, or property without due process of law.

APPENDIX 7

Section 7-32-2107, MCA

Any deputy sheriff now employed or who may hereafter be employed shall

continue in service until relieved of his employment in the manner hereinafter provided and only for one or more of the following specified causes:

(1) conviction of a felony subsequent to the commencement of such employment;

(2) willful disobedience or an order or orders given by the sheriff;

(3) drinking intoxicating liquor while in uniform or while on official duty or being intoxicated in a public place while in uniform or while on official duty;

(4) sleeping while on duty;

(5) incapacity materially affecting ability to perform official duties;

(6) gross inefficiency in the performance of official duties.

APPENDIX 8

Section 7-32-2108, MCA

When a sheriff terminates the employment of a deputy, he shall at the time of termination cause to be served upon said deputy a statement in writing, subscribed and sworn to by the sheriff, setting forth the cause or causes for the discharge or termination of the deputy's employment.

APPENDIX 9

Section 7-32-2109, MCA

Any deputy sheriff whose employment is terminated may, within 30 days from the date of the termination of his employment, make application to the district court of the county wherein the deputy was employed for a hearing before the court, with or without jury, on the charges resulting in the deputy's

termination of employment or discharge.

APPENDIX 10

Section 7-32-2110, MCA

In the event that a deputy prevails at the hearing provided for in 7-32-2109, he shall be entitled to be reinstated as a deputy sheriff at the same salary he received prior to his discharge or termination of employment and he shall also be entitled to any rights that might have accrued to his benefit prior to his discharge or termination of employment, including that salary which he would have received but for the termination.

APPENDIX 11

IN THE SUPREME COURT OF THE STATE OF
MONTANA

No. 89-258

AN APPEAL FROM THE FINAL JUDGMENT ENTERED
BY THE DISTRICT COURT OF THE FIFTEENTH
JUDICIAL DISTRICT OF THE STATE OF MONTANA

MARK N. SMITH,)
)
Plaintiff/Appellant,)
)
-vs-)
)
ROOSEVELT COUNTY, MONTANA and)
SHERIFF JOHN Q. GRAINGER,)
)
Defendants/Respondents.)

BRIEF OF PLAINTIFF/APPELLANT
MARK N. SMITH

ATTORNEY FOR PLAINTIFF/APPELLANT:

ARNIE A. HOVE
P. O. Box 184
Circle, Montana 59215

ATTORNEY FOR DEFENDANTS/RESPONDENTS:

RALPH J. PATCH
P. O. Box 1079
Wolf Point, Montana 59201

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[* * * * THE FOLLOWING IS ONLY THE
ISSUES PRESENTED FOR REVIEW, AND
DISCUSSIONS ON ISSUES NO. 2 AND 3. THE
REMAINDER OF PLAINTIFF'S BRIEF IS
OMITTED. * * * *]

ISSUES PRESENTED FOR REVIEW

1. Whether plaintiff was entitled to summary judgment reinstating him as a deputy sheriff pursuant to Section 7-32-2110, M.C.A. with salary and rights as provided therein.

2. Whether the Court erred in denying plaintiff's Motion in Limine requesting the exclusion of evidence and forbidding the mention of particular facts at the Section 7-32-2109, M.C.A. hearing because they were irrelevant, immaterial and prejudicial and diverted the jury from the single issue.

3. Whether plaintiff was denied due process of law and equal protection under the law by being required to defend against several accusations of mistreatment of prisoners, gross

inefficiency and sleeping on duty when they were not given as the cause or causes for termination in defendant's July 19, 1988 notice of termination required by Section 7-32-2108, M.C.A.

4. Whether there is substantial evidence to support the jury's finding that defendant was justified in terminating plaintiff for gross inefficiency.

5. Whether the Court erred in refusing to allow opinion testimony on what gross inefficiency is under Section 7-32-2107, M.C.A.

6. Whether the Court erred in giving two (2) criminal and two (2) civil tort instructions.

7. Whether the Court erred in admitting statements of alleged prisoner abuse and excluding trial transcript.

8. Whether plaintiff is entitled to his attorney fees under Section 39-3-214, M.C.A. since he is employee and/or Section 7-32-2110, M.C.A.

II.

Whether the Court erred in denying plaintiff's Motion in Limine requesting the exclusion of evidence and forbidding the mention of particular facts at the Section 7-32-2109, M.C.A. hearing because they were irrelevant, immaterial and prejudicial and diverted the jury

from the single issue.

On July 19, 1988, defendant served plaintiff with a letter of termination. Plaintiff was hired by Dean Mahlum October 1, 1985 and had obtained his tenure on October 1, 1986.

On August 17, 1988, plaintiff filed a Complaint and Demand For Jury Trial wherein he requested reinstatement of employment because he was terminated for allegedly mistreating a prisoner on July 6, 1988, in violation of Section 45-5-204, M.C.A., a felony. After filing his Complaint and Demand For Jury Trial, plaintiff was served with a Summons in a Criminal Case to Answer An Indictment charging him with this felony. On January 19, 1989, plaintiff was found not guilty by a jury in U.S. District Court

in Great Falls, Montana. On January 31, 1989, plaintiff filed a Motion in Limine for the reasons discussed below.

The grounds for termination of a tenured deputy are set forth in Section 7-32-2107, M.C.A. Sheriff Grainger was required to give written notice of termination of a tenured deputy's employment and comply with Section 7-32-2108, M.C.A. This section reads in full as follows:

"When a sheriff terminates the employment of a deputy, he shall at the time of termination cause to be served upon said deputy a statement in writing, subscribed and sworn to by the sheriff, setting forth the cause or causes for the discharge or termination of

the deputy's employment."

Defendant's letter of July 19, 1988 is the written notice of termination required by Section 7-32-2108, M.C.A. although plaintiff contends it did not comply with this section when mentioning matters in addition to the specific cause for the termination of the plaintiff's employment. In any event, the letter was served upon plaintiff and was subscribed and sworn to by Sheriff Grainger. Plaintiff has consistently contended the July 19, 1988 letter gives the only cause for the termination of his employment as the alleged mistreatment of Julian Deserly on July 6, 1988 and he is entitled to a hearing only on this cause (charge).

Sheriff Grainger's letter

specifically refers to the July 6, 1988 incident as criminal conduct and a violation of 45-5-204, M.C.A. (See Appendix Page A-2 and 3).

The letter did discuss other incidents which involved plaintiff during his one (1) year period of probation from October of 1985 to October of 1986. These incidents were either unsubstantiated or dealt with by Sheriff Dean Mahlum (T., p.359, 1.13 to p.360, 1.16). The other incidents were not specifically set forth as a cause or causes for the termination of plaintiff's employment and were irrelevant, immaterial and prejudicial in the instant case. The irrelevant, immaterial and prejudicial portion of the letter which plaintiff requested be and should have been deleted and/or removed and

testimony and evidence refused thereon reads as follows:

"On separate occasions in 1986 there were investigations into the use of excessive force. Both are documented in your personnel file and on one incident it is documented that you were suspended without pay for a period of ten (10) days. On your transfer to the Wolf Point area statements were made by you, something to the effect of, "when I come into a new place I like to create as much hate and discontent as I can." This type of attitude and a pattern of using excessive force cannot be tolerated.

"Other problems such as failing to complete reports properly or even at

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all and the fact that you were sleeping on duty while assigned to guard the Agribition have not even been formally addressed yet, but I believe the matter at hand is the major concern of this Department and the disciplinary action taken makes these other violations a moot issue at this time."

Although defendant's July 19, 1989 letter did not comply with Section 7-32-2108, M.C.A., plaintiff still had a right to a hearing on only the cause (charge) resulting in the termination of his employment as set forth in the letter. Section 7-32-2109, M.C.A. reads as follows:

"Any deputy sheriff whose employment is terminated may, within

30 days from the date of the termination of his employment, make application to the district court of the county wherein the deputy was employed for a hearing before the court, with or without jury, on the charges resulting in the deputy's termination of employment or discharge." (Emphasis Added.)

Plaintiff's Motion in Limine was proper and should have been granted under the circumstances. Defendant's letter specifically states the cause for discharge as a July 6, 1988 incident involving the mistreatment of a prisoner. The letter then inappropriately and unfairly listed two (2) other incidents of alleged mistreatment of prisoners in 1986; a failure to complete daily reports

which had been dealt with by plaintiff's supervisor, Ron Jackson, and was never considered grounds for plaintiff's termination (T., p.273, 1.24 to p.274, 1.1); and sleeping on duty which under the facts of the incident, was clearly an off duty assignment dealt with by Sheriff Grainger and Supervisor Jackson and not considered serious enough for termination (T., p.277, 1.5, to p.278, 1.10). In addition, defendants' Memorandum dated February 16, 1989 listed a third incident of alleged mistreatment during plaintiff's probation period and claimed there were at least four occasions of prisoner abuse by plaintiff (See Appendix Pages A-38, 39 and 40). The July 6, 1988 letter did not state the above were specific causes for the termination of plaintiff's employment.

As previously mentioned, the two (2) incidents' in 1986 were dealt with by former Sheriff Dean Mahlum and are not properly a part of the instant case because plaintiff was never charged and the incidents are irrelevant, immaterial and prejudicial. Furthermore, plaintiff's alleged failure to complete reports properly and sleeping while on duty were never dealt with and brought to the attention of plaintiff by Sheriff Grainger (See Appendix Pages A-41, 42 and 43, plaintiff's affidavit attached as Exhibit B to the Motion in Limine; and testimony of Jackson T., p.273, l.24 to p.274, l.1, p. 276, l. 11 to p. 277, l. 8; and Sheriff Grainger T., p.119, l.9-17).

Plaintiff argued the court had authority to grant his Motion In Limine.

Support for plaintiff's argument was found in Wallin V. Kenyon Estate, 164 Mont. 159, 519 P.2d 1236 (1974). The Court in Wallin stated,

"Authority for the granting of a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties. People vs. Jackson, 18 Cal.App.3d 504, 95 Cal.Rptr. 919. Rule 16(6), M.R.Civ.P., permits the court in its discretion to consider "* * * matters as may aid in the disposition of the action." See 94 A.L.R.2d 1087 and 20 Am. Jur. Trials p. 441. (It should be noted here that there was no pre-trial conference.)

"The decision of the district court in excluding questions at trial of the proponent's alleged practice of law was conducive to the prevention of irrelevant, immaterial and prejudicial evidence being heard by the jury. The purpose, and effect, of the court's granting the motion in limine was to prevent that which occurred in the case of In the Matter of the Estate of Powers, 163 Mont. 67, 515 P.2d 368, where many diverse issues were allowed "* * * to divert the trial court from the single issue * * *." Id, 164 Mont. at 164, 519 P.2d at 1238.

In the instant case, plaintiff did not receive a fair trial when evidence of

alleged felonies which he was never convicted of were allowed to be brought to the attention of the jury. Plaintiff was further prejudiced when defendant was permitted to introduce other irrelevant and immaterial evidence which were not the cause or causes given for the termination of plaintiff's employment. In the event the motion had been granted, defendants would not have been prejudiced because Sheriff Grainger's July 19, 1988 letter gave only the one (1) cause for plaintiff's discharge.

Plaintiff was given notice pursuant to Section 7-32-2108, M.C.A. that he was being discharged because of the Julian Deserly incident. The other matters raised in Sheriff Grainger's letter diverted the jury's attention from the issue at hand which was whether plaintiff

was properly terminated or entitled to reinstatement as a tenured deputy.

In conclusion, the Court should have granted plaintiff's Motion in Limine and issued an order excluding evidence and forbidding mention of the particular facts set forth in Sheriff Grainger's letter of July 19, 1988 regarding, two (2) 1986 incidents of alleged prisoner mistreatment, plaintiff's failing to complete daily reports and plaintiff's sleeping on duty. Therefore, plaintiff is entitled to a reversal of the judgment and reinstatement as a deputy sheriff pursuant to Section 7-32-2110, M.C.A. with salary and rights as provided therein, or in the alternative, a new trial in which the irrelevant, immaterial and prejudicial evidence in the July 19, 1988 letter and testimony thereon is

excluded.

III.

Whether plaintiff was denied due process of law and equal protection under the law by being required to defend against several accusations of mistreatment of prisoners, gross inefficiency and sleeping on duty when they were not given as the cause or causes for termination in defendant's July 19, 1988 notice of termination required by Section 7-32-2108, M.C.A.

In March at the 7-32-2109, M.C.A. hearing, plaintiff was required to defend against several accusations of mistreatment of prisoners, gross inefficiency and sleeping on duty. Plaintiff alleges it was error to require

him to defend against accusations Sheriff Grainger claimed were causes for his termination when they were previously dealt with, not substantiated or he had no written notice thereof. Because the trial court permitted testimony and evidence of the above, plaintiff contends he was denied due process of and equal protection under the law.

In the July 19, 1988 notice of termination, Sheriff Grainger lists allegations of excessive force, statements made by plaintiff, failure to file reports, and sleeping while on duty which plaintiff was required to defend against when the District Court refused to grant the Motion in Limine. The applicable part of July 19, 1989 letter read:

"On separated occasions in 1986,

there were investigations into the use of excessive force. Both are documented in your personnel file and on one incident it is documented that you were suspended without pay for a period of ten (10) days. On your transfer to the Wolf Point area statements were made by you, something to the effect of, "when I come into a new place I like to create as much hate and discontent as I can." This type of attitude and a pattern of using excessive force cannot be tolerated.

"Other problems such as failing to complete reports properly or even at all and the fact that you were sleeping on duty while assigned to guard the Agribition have not even

been formally addressed yet, but I believe the matter at hand is the major concern of this Department and the disciplinary action taken makes these other violations a moot issue at this time."

Defendants' Memorandum dated February 16, 1989 sets forth six (6) of the more serious allegations defendants expected to be proven. The allegations were as follows:

"1. Beating Terry Ruffatto on the knee with a heavy flashlight on March 14, 1986.

"2. Severely beating Gail Charbonneau on the shin with a heavy flashlight on March 16, 1986.

"3. Excessive and unreasonable force in the arrest and transport of

Alvino Robles at Poplar, Montana on April 25, 1986.

"4. Failure to report or document the seizure of evidence from Luisa Rybicki residential burglary on January 12, 1987.

"5. Excessive and unreasonable force in the booking of Julian Deserly at Roosevelt County jail on July 6, 1988.

"6. Sleeping while on duty guarding NEMONT Agribition on May 6, 1988."

The rule applicable to the instant case is Rule 103, Montana Rules of Evidence which read as follows:

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

"(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
"...."

Under Section 7-32-2109, M.C.A., Plaintiff had a right to the hearing on the specific cause or causes for his termination listed in the July 19, 1988 letter. Plaintiff had filed a Motion in Limine to limit testimony and evidence to the Julian Deserly incident. The motion was denied on February 23, 1989. Plaintiff renewed this motion on March 28, 1989 before the beginning of the hearing. The motion was again denied.

Plaintiff's filing of the motion and renewal of the same were timely.

In the motion, plaintiff requested the Court exclude the other incidents of alleged prisoner abuse because they were not set forth as the cause or causes for the termination of Plaintiff's employment and were irrelevant material and prejudicial in the instant case (See Plaintiff's Brief in Support of Motion in Limine, p.4, 1.22 - p.5, 1.15). Plaintiff further advised the trial court that the two (2) incidents in 1986 were dealt with by former Sheriff Dean Mahlum and were not properly a part of the instant case because they were unsubstantiated and plaintiff was never charged with the same. Therefore, the incidents were irrelevant, immaterial and prejudicial (See Plaintiff's Brief in

Support of Motion in Limine, p.6, L.7-8).

Plaintiff further contended he would be denied due process and equal protection under the law and a fair trial if evidence of alleged felonies which he had never been convicted of were allowed to be brought to the attention of the trier of fact. Finally, plaintiff contended he would be prejudiced if defendants were permitted to introduce this evidence which was irrelevant and immaterial to the cause actually given as the termination of his employment (See Plaintiff's Brief in Support of Motion in Limine, p.7, 1.5-11).

In defendant's memorandum, they took the position that these matters were relevant and stated,

"In the instant case it is only required that the defense establish

by a preponderance of the evidence that plaintiff violated directives of the Sheriff's Personnel Manual and that those violations constitutes gross inefficiency in the performance of official duties or that plaintiff slept while on duty.

"These allegations are expressed and inferred in the letter of termination and are all allegations that need to be presented to and considered by the trier of fact.

"At trial, the defense is prepared to establish by a preponderance of the evidence that plaintiff violated numerous Rules of Conduct, abused prisoners in his custody on at least four occasions,

committed or omitted other acts which only a jury can decide whether they constitute gross inefficiency and that he slept while on duty."

(See Appendix Page A-39.)

At the trial, Sheriff Grainger's testimony established his theory for the termination of plaintiff was that his letter listed several incidents of alleged prisoner abuse which constituted gross inefficiency. Sheriff Grainger further testified this was in compliance with state law despite plaintiff being found not guilty. This testimony reads as follows:

"Q So one cause under the statute, gross inefficiency. Now all of those things that we have discussed here today, testified here today here, what is it that fits

into the gross inefficiency statute?

"A Every incident of excessive force and assaulting prisoners including the Julian Deserly incident is gross inefficiency in performing his duties.

"Q How is that gross inefficiency?

"A If something happens enough times, you finally -- it becomes gross at a certain point and beating prisoners or even mistreating prisoners is not a procedure that law enforcement uses, and therefore if it is not an efficient means to do it, then it is inefficient.

"Q. A jury in Great Falls, Montana found him not guilty of the

charge that you are trying to relate here today he is guilty of. Let's go back again. How can you bring that up, he was found not guilty of.

"A Because it happened."

"Q. Well the jury didn't believe that it (sic) happened, or they wouldn't have found him not guilty of it, John.

"A. The jury found him not guilty of the criminal aspects of the assault.

"Q. But you're saying that it happened. It was investigated and presented to the jury and said he was not guilty?

"A. It was investigated, he was terminated and we terminated him, and then through the procedures of the Bureau of Indian Affairs,

because there was an Indian prisoner, and the Federal Court (sic) indicted him, and that had nothing to do with the termination. He was terminated because of his acts, administratively, and in accordance with state law. (T., p.129, 1.8 to p.130, 1.14).

Sheriff Grainger on two occasions admitted there was nothing in his letter to put plaintiff on notice that he was being terminated for gross inefficiency. This testimony reads,

"Q Now, these three other alleged assaults on prisoners. Was he ever charged with any felony on any of those other assault?

"A Not to my knowledge, no. The felony, or the criminal aspect, I don't believe so.

"Q Where in your letter did you state that you fired him for gross inefficiency?

"A It is not stated specifically in the letter.

"Q But you've come up with this gross inefficiency since that letter, is that correct?

"A No.

"Q Where is that in the letter?

"A It is not in the letter, specifically." (T., p.83, 1.15-p.84, 1.2.)

and

"Q But it is your duty to notify him of specific causes for his termination, right? Shouldn't it have said then in the letter gross inefficiency?

"A It doesn't say specifically. I agree with you that it should state gross inefficiency, but it doesn't say specific as to that, but it has to be one of those -- but it doesn't say gross inefficiency in there as that reason.

"Q But that cause is not in the letter of termination, is it?

"A No." (T., p.114, 1.4-13.)

There is no definition of gross inefficiency as given by Sheriff Grainger in the statute or given to the jury by instruction. It was error for the trial court to permit the evidence of the alleged incidents of prisoner abuse when the incidents had been investigated and were previously dealt with by former Sheriff Dean Mahlum, unsubstantiated or

not considered serious enough to deal with during plaintiff's first year of probation with the Roosevelt County Sheriff's Department (See Letters dated March 26, 1986 and August 12, 1986 on Gail Charbonneau incident in Appendix Pages A-44, 45 and 46, respectively; Sgt. WJ Buzzell's Report dated March 14, 1986 in Appendix Page A-47; Michael J. Speer's Reports dated March 14, 1986 and March 17, 1986 on the Terry Ruffatto incident in Appendix Pages A-48 and 49, respectively; Testimony of Sheriff Mahlum T., p.359, 1.13 to p.360., 1.16; and Robert J. Damm T., p.348, 1.6-22.)

In addition, it was error for the trial court to permit evidence of failure to file reports as a part of whether plaintiff was guilty of gross inefficiency for several reasons.

First, the failure to file reports was not given as the cause for plaintiff's termination and Sheriff Grainger admitted he was not using failing to file daily reports as a cause for plaintiff's termination (T., p.76, 1.15-21). Second, Supervisor Jackson testified that he had sat down with Mark and they were caught up with their daily reports (T., p.272, 1.9 to p.273, 1.19). Third, there was never any discussion between the Supervisor Jackson and Sheriff Grainger that failure to file daily reports would be grounds for plaintiff's termination (T., p.273, 1.24 to p.274, 1.1). Finally, the Record Supervisor testified probably all officers had not been written up for missing daily reports (T., p.205, 1.11 to p.208, 1.4 and Plaintiff's Exhibit 5).

It was error for the trial court to permit testimony of sleeping on duty when the July 19, 1988 letter did not specifically set forth sleeping on duty as the cause for plaintiff's termination. Sheriff Grainger testified plaintiff was not terminated for sleeping while on duty (T., p.115, 1.22 to p.116, 1.4). Furthermore, the testimony established that only officers who were off duty or off shift could work special assignments or persons not affiliated with the Roosevelt County Sheriff's Department (See Testimony of Supervisor Jackson T., p.277, 1.9-25, p.278, 1.1-10 to p.279, 1.12-25; Michael Speer T. p.302, 1.12-25 to p.303, 1. 3-20; former Sheriff Mahlum T., p.452, 1.1-25 and p.557, 1.13 to p.558, 1.4 ; and former Undersheriff Damm T., p.454, 1.11 to p.455, 1.4 when

transcript completed). Finally, the testimony established there were conversations between Sheriff Grainger and Supervisor Jackson on possible disciplinary action. Termination was not recommended or considered by the Supervisor and Sheriff (T., p.274, 1.6-16, p.276, 1.2 to p.277, 1.16).

During the direct examination of Sheriff Grainger, defendants attempted to limit the use of the testimony on the other accusations of mistreatment of prisoners by an admonition to the jury in the form of the Just Instruction which is a criminal instruction. Plaintiff objected to this instruction during a noon recess and this instruction did nothing to correct the denial of due process or provide equal protection under the law. The Court read the following

instruction before allowing the testimony:

"Ladies and Gentlemen, you are about to hear evidence offered by the Defendant that at other times the Plaintiff engaged in other wrongs or acts. The evidence you are about to hear is not being admitted to prove the character of the Plaintiff in order to show that he acted in conformity therewith. The purpose of admitting this evidence is to show guilty knowledge of the offense for which the Plaintiff was terminated, to show malice, to rebut any claim of accident or mistake, to show motive and to show plan and intent. You may not consider this evidence for any other purposes. The Plaintiff

was not terminated for the other offenses." (T.T., p.86, 1.11 to p.88, 1.6.)

In conclusion, plaintiff was denied due process of law and equal protection under the law by being required to defend against several accusations of mistreatment of prisoners, gross inefficiency and sleeping on duty when they were not given as the cause or causes for termination in defendant's July 19, 1988 notice of termination required by Section 7-32-2108, M.C.A. Therefore, plaintiff is entitled to a reversal of the judgment and reinstatement as a deputy sheriff pursuant to Section 7-32-2110, M.C.A. with salary and rights as provided therein, or in the alternative, a new hearing.

